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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 571

GRAHAM HARLEY,

Petitioner,

vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court for the Eastern District of Wisconsin,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SIDNEY M. EISENBERG
HERBERT R. MANGER
1131 W. State St.
Milwaukee 3, Wisconsin
Attorneys for Petitioner.

HAMMERSMITH-KORTMEYER CO.
MILWAUKEE

INDEX

	Page
Petition	1
Opinions Below	2
Questions Presented for Review	2
Statute Involved	2
Jurisdiction	3
Statement of the Case	3
Argument for Reversal of Order	4
Conclusion	6
Certificate	7
Appendix A	
Order of U.S. Court of Appeals for the Seventh Circuit	8
Appendix B	
Decision of U.S. District Court, Eastern District of Wisconsin	9

LIST OF AUTHORITIES CITED

Cases

Chicago, Rock Island & Pacific Rd. Co. v. High Breeding Co., (C. A. 10) 232 F. 2d 584, 587-588	5
Ford Motor Co. v. Ryan, 2 Cir., 182 F. 2d 329, 330, Cert. den. 340 U.S. 851	5

Page

General Portland Cement Co. v. Perry, (CA-7), 204 F. 2d 316, 319-320 5

Grubs v. Consolidated Freight Ways, Inc., (D.C. Montana), 189 F. Supp. 404, 409 5

Jenkins v. Wilson Freight Forwarding Co., (D.C. NY), 104 F. Supp. 422, 424 5

Statutes Involved

28 U.S.C., Sec. 1404(a) 2

28 U.S.C., Sec. 1254(1) 3

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Graham Harley, Petitioner herein, prays that a Writ of Certiorari be issued to review the order of the Circuit Court of Appeals for the Seventh Circuit denying petitioner's petition for Writ of Mandamus to vacate and set aside order entered by the United States District Court for the Eastern District of Wisconsin on July 25, 1962 adjudging transfer of the action, No. 61-C-147, in which the petitioner, Graham Harley, is plaintiff and Louisville and Nashville Railroad Company is defendant, from the United States District Court for the Eastern District of Wisconsin to the United States District Court for the

Northern District of Georgia in the pending action for the recovery of damages instituted by petitioner against said railroad company. The motion for transfer was made by said Louisville and Nashville Railroad Company under Section 1404(a), Title 28 U. S. C., and was opposed by petitioner.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit of August 12, 1962, was entered without a hearing and is copied in Appendix A (post p. 8).

The opinion and order made and filed on July 25, 1962 in the United States District Court for the Eastern District of Wisconsin, Honorable Robert E. Tehan, District Judge, Presiding, is copied in Appendix B (post p. 9).

QUESTIONS PRESENTED FOR REVIEW

Was a sufficient showing made by the Louisville and Nashville Railroad Company to justify the order of July 25, 1962 entered in the District Court of the United States for the Eastern District of Wisconsin, which order the United States Court of Appeals for the Seventh Circuit refused to vacate and set aside by its order of August 12, 1962 on petitioner's petition to it for writ of mandamus?

STATUTE INVOLVED

Section 1404(a), Title 28, U.S.C. provides:

> "For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

JURISDICTION

The order of the Honorable Robert E. Tehan, judge of the United States District Court for the Eastern District of Wisconsin, was entered on July 25, 1962 and the order of the United States Court of Appeals for the Seventh Circuit was made and entered on August 13, 1962.

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C., Section 1254(1).

STATEMENT OF THE CASE

The petitioner, Graham Harley, a Wisconsin citizen, as plaintiff brought suit in the Circuit Court of Milwaukee County, Wisconsin, against the defendant, Louisville and Nashville Railroad Company, a foreign corporation, to recover $30,000.00 damages, allegedly sustained by him in the state of Georgia as the result of the negligence of the defendant, Louisville and Nashville Railroad Company, in the operation of its train on which he was a passenger. The action was removed from the Circuit Court of Milwaukee County, Wisconsin, to the United States District Court for the Eastern District of Wisconsin and after the filing of its answer, the defendant Louisville and Nashville Railroad Company, moved for transfer of the action from the United States District Court for the Eastern District of Wisconsin to the United States District Court for the Northern District of Georgia. The motion for transfer was opposed by petitioner who filed in that behalf the affidavit of Sydney M. Eisenberg, one of his attorneys, and, also, his motion that the motion of the Louisville and Nashville Railroad Company be dismissed on the ground, among others, that the change of venue sought is not necessary for the conven-

ience of the parties and witnesses and is not in the interests of justice.

The District Judge filed its opinion and order dated July 25, 1962, of which a copy is annexed, Appendix B, (post p. 9). The order of the Circuit Court of Appeals for the Seventh Circuit, dated August 13, 1962 denied review thereof.

ARGUMENT

The showing made by the Louisville and Nashville Railroad Company in support of its motion for transfer is set forth in the two affidavits of one of its Milwaukee attorneys, which contained a list of nine alleged witnesses and employees without more. Such hearsay showing does not state any facts material to or connected with the cause of action. Indeed, nothing whatsoever appears in the record concerning any knowledge of facts, if any, possessed by the nine witnesses, individually or collectively. Therefore, no basis whatever existed for the motion and the same should have been denied.

The District Court in this connection ventured the statement that the showings of both the plaintiff and defendant were "sparse", overlooking the fact that on material points the defendant made no showing whatsoever. The showing made by the defendant was inadequate, because it purposely made no showing of material facts whatsoever. The Court, however, indulged the presumption that the cost of obtaining witnesses would be less if the trial were held in Georgia. Certainly, in no respect or to any degree did the defendant make any showing having any force or validity.

The burden of proof is on the defendant to make the requisite showing and make out a strong case for a transfer.

It was so held in *Ford Motor Company v. Ryan*, 2 Cir., 182 F. 2d 329, 330, cert. den. 340 U. S. 851:

> "We think that by Sec. 1040(a) Congress did not alter the standards theretofore embodied in the doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which the doctrine did not previously apply. So we read Ex Parte Collett, 327 U. S. 55, 69 S. Ct. 944, 949, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. vs. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 838, 843, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words, we interpret to mean (a) that the defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege conferred by statute, of choosing a forum he selected is a factor to be considered against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'."

The following authorities support petitioner's contentions:

General Portland Cement Co. v. Perry, (CA-7), 204 F. 2d 316, 319, 320.

Chicago, Rock Island & Pacific Rd. Co. v. High Breeding Co., (CA-10), 232 F. 2d 584, 587, 588.

Jenkins v. Wilson Freight Forwarding Co., (DC NY), 104 F. Supp. 422, 424.

Grubs v. Consolidated Freight Ways, Inc., (D.C. Montana), 189 F. Supp. 404, 409.

In addition, the affidavits submitted by the defendant made by its counsel, while fatally deficient as pointed out, are based on hearsay, and, therefore, must be disregarded.

It is respectfully prayed by petitioner that a writ of certiorari directed herein to the United States Court of Appeals for the Seventh Circuit and that in due course the issues involved be ruled upon by this Honorable Court.

Respectfully submitted,

SIDNEY M. EISENBERG
HERBERT R. MANGER
Attorneys for Petitioner,
Graham Harley.

Post Office Address:
1131 W. State St.
Milwaukee 3, Wisconsin

CERTIFICATE

As one of the attorneys for Graham Harley, petitioner above named, I do hereby certify that a printed copy of the foregoing, together with the appendix, have been served on the Honorable Robert E. Tehan, Judge of the United States District Court for the Eastern District of Wisconsin, on Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, on Wickham, Borgelt, Skogstad and Powell, Attorneys for the Louisville and Nashville Railroad Company, and on Solicitor General, Department of Justice, Washington 25, D.C. by placing copies of same in the United States mail, directed to them at their respective offices, postage prepaid.

Dated, Milwaukee, Wisconsin, this 26 day of October, 1962.

Herbert R. Manger,
Attorney for Petitioner.

APPENDIX A
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. DATED AUGUST 13, 1962.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Monday, August 13, 1962
Before
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

GRAHAM HARLEY,
Petitioner,

No. 13847
vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court for the Eastern District of Wisconsin,
Respondent.

} Original Petition for Mandamus.

This matter comes before the Court on the petition of Graham Harley that a writ of mandamus issue out of this Court commanding the respondent to vacate and set aside an order entered by the United States District Court for the Eastern District of Wisconsin on July 25, 1962, and for other relief, filed in this Court on August 10, 1962.

On consideration whereof, IT IS HEREBY ORDERED that the aforesaid petition of Graham Harley for writ of mandamus and other relief be, and the same is hereby, DENIED, pursuant to Rule 19 of the Rules of this Court.

(Seal)
A True Copy:
Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED JULY 25, 1962.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GRAHAM HARLEY,

Plaintiff,

vs. No. 61-C-147

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a foreign corporation,

Defendant.

OPINION AND ORDER CHANGING VENUE

In this action which was removed to this court from the Circuit Court of Milwaukee County, Wisconsin, the plaintiff, Graham Harley, a Wisconsin citizen, seeks to recover $30,000 damages from the defendant, Louisville and Nashville Railroad Company, a Kentucky corporation, for injuries allegedly sustained by him in the State of Georgia as a result of the negligence of the defendant in maintaining and operating a train on which he was a passenger. After filing its answer, the defendant moved for a transfer of this action from this court to the United States District Court for the Northern District of Georgia where, concededly, it might have been brought.

As we stated in Wyandotte Transportation Company v. Great Lakes Towing Company, 1961, 196 F. Supp. 494, the tests to be applied in determining whether a motion for change of venue pursuant to §1404(a), Title

28, U. S. C. should be granted are (1) the convenience of parties, (2) the convenience of witnesses, and (3) the interest of justice, and in applying the latter test the court is to consider the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of a view of the premises, and the state of the court calendars. While the facts presented by the parties as shown in the pleadings and in the affidavits of the defendant in support of its motion for change of venue and the plaintiff in support of his motion to dismiss that motion are sparse, it is our belief that the defendant has shown its entitlement to the relief requested.

With respect to the first test, the balance of convenience weighs heavily in favor of the plaintiff, since he is a Wisconsin resident whose convenience would be better served by trial in this district while the defendant maintains its home offices not in the Northern District of Georgia but in Louisville, Kentucky. With respect to the second test, however, it appears that all of the defendant's witnesses, being nine in number, reside in Georgia, Tennessee and Kentucky, and that a trial in the Northern District of Georgia would be far more convenient to them than a trial here. We have no way of weighing against this demonstrated convenience to the defendant's witnesses of a trial in Georgia the convenience to the plaintiff's witnesses of trial here, since the plaintiff's counsel, in his affidavit, has stated only that an unspecified number of unidentified persons who are Wisconsin residents, including two treating physicians, will be called by the plaintiff at the trial.

It further appears that since the events giving rise to the plaintiff's alleged injuries occurred in Georgia a view

of the premises would be more readily had were trial held in that state, that the cost of obtaining the attendance of the only identified witnesses at a trial would be less if the trial were held in Georgia, and that seven of the defendant's witnesses could be reached by process in Georgia. The Annual Report of the Administrative Office of the United States Courts for the fiscal year 1961 reveals that the running time for cases which go to trial is less in the Northern District of Georgia than in this district.

In our opinion the convenience of witnesses and the interest of justice would be better served by a transfer of this action to the Northern District of Georgia. The motion of the defendant for such transfer will therefore be granted and the motion of the plaintiff to dismiss said motion will be denied.

For the above and foregoing reasons,

IT IS ORDERED: That

1. The motion of the defendant Louisville and Nashville Railroad Company for a transfer of this action from this court to the United States District Court for the Northern District of Georgia be and the same is hereby granted.

2. The motion of the plaintiff Graham Harley to dismiss the defendant's motion for change of venue be and the same is hereby denied.

Dated, Milwaukee, Wisconsin, this 25th day of July, 1962.

ROBERT E. TEHAN
U. S District Judge